



FILED
Feb 13 2009, 9:17 am
Kevin L. Smith
CLERK
of the supreme court,
court of appeals and
tax court

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**IN THE
COURT OF APPEALS OF INDIANA**

[illegible]

No. 14A01-0806-CR-268

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Special Judge
Cause No. 14C01-0605-FA-4

February 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Robert T. Dempsey appeals his sentence for Class B felony conspiracy to commit dealing in methamphetamine¹ and Class B felony aiding dealing in methamphetamine.² We affirm.

FACTS AND PROCEDURAL HISTORY

On February 9, 2006, Dempsey's wife, Linda, was manufacturing methamphetamine in their home in Odon. Dempsey assisted Linda by purchasing cold medicine and by handing her supplies as she needed them. At one point, Linda took some chemicals into the living room to "clean" or "filter" them, and there was an explosion. (Tr. at 46.) The house caught fire, and Linda died.

Dempsey was able to escape, and he went two miles down the road to the home of James Aishe. From Aishe's house, he called Linda's daughter, Stephanie Juarez, who took him to Washington, Indiana. Detective Gary Allison interviewed Aishe, who showed him several calls from Illinois on his caller ID. This led Detective Allison to believe Dempsey was attempting to flee to Illinois. Juarez's husband showed Detective Allison where Dempsey had been dropped off, and police were able to apprehend Dempsey in Washington.

On September 25, 2007, Dempsey pled guilty to conspiracy to commit dealing in methamphetamine and aiding dealing in methamphetamine, both as Class B felonies. After the denial of a motion to withdraw guilty plea and several continuances granted at Dempsey's request, a sentencing hearing was held on April 22, 2008.

¹ Ind. Code §§ 35-41-5-2 (conspiracy) and 35-48-4-1.1(a)(1) (dealing in methamphetamine).

² Ind. Code §§ 35-48-4-1.1(a)(1) and 35-41-2-4 (aiding an offense).

Dempsey testified he and Linda lived in Centralia, Illinois before moving to Indiana. Dempsey worked at a factory. Linda did not work and was using methamphetamine every day. Dempsey admitted he used it “[a] little bit.” (*Id.* at 35.) He wanted to quit, so he asked his family to help him get a separate apartment, which they did. He avoided Linda for two or three weeks and did not use methamphetamine during that time. He then moved back in with Linda because he loved her and she promised she would quit using methamphetamine.

In 2003, the Dempseys moved to Washington, Indiana, and then to Odon. They stayed away from drugs “for a little while, and then we got right back into it.” (*Id.* at 38.) Dempsey testified he stayed clean for a year and held a job making car parts for six months until he was laid off. He denied being laid off for drug-related reasons. Linda began using drugs after a couple months. She did not work, and she began manufacturing methamphetamine in their home. Dempsey did not find other employment, and he started using methamphetamine again because it “was around me every day, all day long, you know, finally I just give [sic] in.” (*Id.* at 43.)

Dempsey admitted that in May 2005, he traveled to Johnson County to purchase pills and batteries for making methamphetamine. He was arrested by Greenwood police, but no charges were filed. He also purchased cold medicine pills a few days before the explosion. Dempsey admitted he had sold methamphetamine in Illinois, but he claimed he “didn’t sell hardly none” after they moved to Indiana. (*Id.* at 72.) He contended they were not making money on their drug operation because they were supporting Linda’s addiction.

Dempsey knew manufacturing methamphetamine was dangerous, and they had fires on four occasions prior to the explosion in which Linda died. Dempsey was in the kitchen at the time of the explosion. He ran to get a fire extinguisher, but he could not get through the dining room door because of the intense flames. He ran to the windows, broke them open, and called for Linda, but he got no response. Dempsey claimed he did not call for help because he was scared and because Aishe was the only person in the area he knew; however, he acknowledged on cross-examination that his landlords lived across the street.

The trial court identified three aggravators: (1) Dempsey's criminal history, consisting of six felony and eight misdemeanor convictions; (2) Dempsey's actions "posed a substantial risk to the community, and even resulted in death"; and (3) "prior probations and lenient treatment were not successful." (Appellant's App. at 375-76.) The court found as mitigators Dempsey's guilty plea and that Dempsey's previous convictions were distant in time. Finding the aggravating factors substantially outweighed the mitigators, the trial court imposed a twenty-year sentence on each count, to be served concurrently.³

DISCUSSION AND DECISION

Dempsey raises four issues, which we reorder and restate as: (1) whether the trial court abused its discretion by finding aggravators the record did not support; (2) whether the trial court abused its discretion by not finding mitigators supported by the record; (3)

³ "A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years." Ind. Code § 35-50-2-5.

whether the trial court's sentencing order is sufficiently specific; and (4) whether his sentence is appropriate in light of his character and the nature of his offense.

1. Aggravating Circumstances

Sentencing decisions rest within the sound discretion of the trial court and are reviewed for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id.* A trial court may abuse its discretion by finding aggravators that are not supported by the record. *Id.*

Dempsey argues the record does not support the finding that he has six prior felony convictions and eight prior misdemeanor convictions. The record is unclear whether two of the offenses the trial court counted as misdemeanor convictions might have been only infractions. These offenses are described in the presentence investigation report as "Transporting/Carrying Alcohol Liq/Pass" in 1997 and "Transporting/Carrying Alcohol Liq/Driver" in 1990.⁴ (Appellant's App. at 276.) Dempsey was fined for each and did not serve any time.

The trial court's characterization of these offenses as misdemeanors does not warrant resentencing. Even if the trial court abuses its discretion, we will not remand if

⁴ Dempsey's counsel included the presentence investigation report on white paper in his appendix. App. R. 9(J) requires documents and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) be filed in accordance with Trial Rule 5(G). Presentence reports are excluded from public access and are confidential. Counsel's inclusion of the presentence investigation report on white paper in the appendix is therefore inconsistent with Trial Rule 5(G), which requires such documents be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential." *Hamed v. State*, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006).

we can say with confidence the trial court would have imposed the same sentence. *Anglemeyer*, 868 N.E.2d at 491. The pre-sentence investigation report reflects a minimum of six felony convictions and six misdemeanor convictions. This is a significant criminal history, and we are confident the trial court would not have imposed a different sentence even if the 1990 and 1997 offenses were infractions.

Dempsey also argues the record does not support finding “prior probations and lenient treatment were not successful.” (Appellant’s App. at 375-76.) The presentence investigation report indicates Dempsey had probation revoked under two separate cause numbers, and Dempsey testified he had probation revoked “one time, it might have been two.” (Tr. at 62.) The trial court did not abuse its discretion in its identification of aggravating circumstances.

2. Mitigating Circumstances

Dempsey argues the trial court abused its discretion by failing to recognize several proffered mitigators. “An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.” *Anglemeyer*, 868 N.E.2d at 493.

Dempsey argues the nature and circumstances of the offense are mitigating, his offenses are the result of circumstances unlikely to recur, and there are substantial grounds tending to excuse or justify the crime though failing to establish a defense. He asserts he tried to quit using methamphetamine, but “was thwarted by his wife.” (Appellant’s Br. at 16.) He argues his role in the manufacturing was small and his involvement “was facilitated by his wife Linda due to her tragic addiction.” (*Id.* at 14.)

Dempsey's argument downplays his own addiction and ignores the fact that the drugs were also being manufactured for his use. The trial court was not required to view Linda's role in the offenses as mitigating. *See Espinoza v. State*, 859 N.E.2d 375, 387 (Ind. Ct. App. 2006) (trial court not obligated to accept defendant's arguments as to what constitutes a mitigating factor or to give it same weight as the defendant).

Dempsey argues there is little or no risk he will reoffend, noting he pled guilty, had not used drugs in the twenty-six months he was incarcerated prior to the sentencing hearing, was fifty-eight at the time of sentencing, and was greatly impacted by the death of his wife. Based on the same facts, he argues he is likely to respond affirmatively to probation or short-term imprisonment. He asserts "the record supports the fact that Robert Dempsey 'gets it.'" (Appellant's Br. at 17.)

We disagree. Dempsey's arguments to this Court and the trial court attempt to shift blame to Linda. He downplays his own drug use, arguing Linda thwarted his attempts to quit using methamphetamine. He characterizes Linda as the one "in charge" of the methamphetamine operation, (Tr. at 41), and ignores the evidence he traveled a significant distance to obtain supplies and was undeterred by his arrest for possession of precursors. He initially admitted he had sold drugs only in Illinois, but later admitted he also sold drugs after he moved to Indiana. He testified they were not making money selling drugs because they were supporting Linda's habit, but he too was an addict and used the drugs Linda manufactured.

The presentence investigation report indicates Dempsey began using drugs at age seventeen or eighteen, has tried almost every kind of drug, and began using

methamphetamine in 1998. He told the interviewer he had never participated in drug treatment, although he had previously been ordered to do so as a condition of probation. When asked at the sentencing hearing why he did not seek help with his addiction, Dempsey said, “I don’t know, I was just too addicted, I guess.” (*Id.* at 56.) Given Dempsey’s minimization of his involvement in drugs, his refusal to participate in treatment even when ordered to do so, and his failure to be deterred by previous contacts with law enforcement, the trial court was not obligated to find there was little risk Dempsey would reoffend or he was likely to respond to probation or short-term imprisonment.

Dempsey argues he did not contemplate serious harm would result from his actions. This proffered mitigator also is not supported by the record. Dempsey was familiar with the manufacturing process and knew it was dangerous. There had been fires on four occasions prior the explosion in which Linda died.

Next, Dempsey argues the trial court failed to recognize he had led a law-abiding life for a substantial period. Although most of Dempsey’s convictions are not recent, Dempsey has not been leading a law-abiding life. He began using methamphetamine in 1998, and he admitted he sold drugs while living in Illinois and Indiana.⁵ Although he

⁵ Dempsey argues the State “improperly contended that Robert Dempsey had been involved in the sale and manufacture of methamphetamine for years” because “the original charge alleging that Dempsey conspired to manufacture more than 3 grams of methamphetamine was amended . . . pursuant to this plea and the elements of those offenses cannot be used to aggravate the remaining offenses.” (Appellant’s Br. at 12); *See Farmer v. State*, 772 N.E.2d 1025 (Ind. Ct. App. 2002). The trial court did not treat the evidence of Dempsey’s extensive drug involvement as an aggravator, and Dempsey cites no authority requiring the court to ignore such evidence when considering whether to recognize mitigators such as likelihood to reoffend or leading a law-abiding life for a substantial period.

claims to have been clean for a year after moving to Indiana, he obtained supplies for drug manufacturing as early as May 2005.

Dempsey argues he “would be willing and capable of making restitution to any victim in this cause.” (Appellant’s App. at 17.) A relative of Dempsey testified a former employer was willing to rehire him. Nevertheless, we cannot say the trial court abused its discretion. Dempsey does not have a high school diploma or a GED. He had not been employed for a significant period prior to his arrest, and his most recent employment lasted six months.

Finally, Dempsey argues imprisonment is an undue hardship to him because he needs the support of his family to cope with the loss of his wife and his step-daughters. Dempsey’s step-daughters both passed away after he was imprisoned, and he expressed regret at not being able to attend their funerals. However, when one engages in criminal conduct, one takes the risk of being incarcerated during significant family events. Dempsey’s criminal actions contributed to Linda’s death, and we cannot say the trial court erred by declining to consider imprisonment an undue hardship.

3. Sentencing Statement

Dempsey argues the sentencing statement does not identify significant mitigating circumstances, does not state why the circumstances identified are aggravating or mitigating, and does not demonstrate the circumstances have been weighed. He cites *Westmoreland v. State*, 787 N.E.2d 1005 (Ind. Ct. App. 2003), and *Powell v. State*, 751 N.E.2d 311 (Ind. Ct. App. 2001), cases decided under our former sentencing scheme. Trial courts no longer have an obligation to weigh aggravating and mitigating factors, and

we no longer review a trial court's weighing for abuse of discretion. *Anglemeyer*, 868 N.E.2d at 491. However, a trial court must enter a sentencing statement that includes "a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence." *Id.* If the trial court finds aggravating or mitigating circumstances, the court must "identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Id.*

We have already rejected Dempsey's arguments concerning the trial court's identification of aggravating and mitigating circumstances, and we will not review the weight attached to them. The sentencing statement is sufficiently specific to facilitate appellate review, and we find no abuse of discretion. *See id.* at 489 (purpose of sentencing statement is to guard against arbitrary and capricious sentencing and to provide a basis for appellate review).

4. Appropriateness of Sentence

Although a trial court may have acted within its lawful discretion, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review of sentences. *Id.* at 491. This authority is implemented through Ind. Appellate Rule 7(B), which provides the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The defendant bears the burden of persuading us the sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Dempsey attempts to minimize his role in the manufacturing, but he travelled a significant distance to obtain supplies. He focuses on his wife's addiction, but he was also an addict and used the drugs that were manufactured in their home. Dempsey never participated in treatment, although he was ordered to do so. He has not been employed for a significant period, and he admitted he sold methamphetamine. Dempsey knew manufacturing methamphetamine was dangerous. After the explosion, he did not call for assistance to get Linda out of the house or put out the fire. Dempsey has at least six felony convictions and six misdemeanor convictions,⁶ and he has twice had probation revoked. Dempsey's character and the nature of his offenses do not persuade us that his sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.

⁶ These convictions include theft, unlawful delivery of controlled substance, deceptive practices, battery, driving on a suspended license, and driving under the influence.